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DEC

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 370

J. W. ALFORD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

On Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit.

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Petitioner, in his brief in support of his petition for a writ of certiorari has fully argued the law relative to the points raised. He respectfully requests that such brief be considered as his brief on the merits and files this supplemental brief in amplification thereof and in answer to the counter-contentions in the Government's brief in opposition thereto.

OPINION BELOW.

The majority opinion of the Circuit Court of Appeals (R. p. 492), and the dissenting opinion (R. p. 503), are reported in 41 F. (2d) 157.

JURISDICTION.

The judgment sought to be reviewed was entered on May 26, 1930 (R. p. 506). A petition for rehearing was denied on June 26, 1930 (R. p. 507).

The petition for certiorari was filed on August 21, 1930. On October 20, 1930, an order was entered granting the petition.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner, J. W. Alford, was indicted on January 3, 1929, by the Grand Jury of the United States in and for the Southern District of California, Central Division. Said indictment charged the defendant with six violations of Section 215 of the Criminal Code of the United States or, as it is more commonly called, with using the United States mails for the purpose of executing a scheme or artifice to defraud. The indictment is set forth at length from pages 3 to 15 of the transcript of record.

The indictment alleges but one scheme to defraud which scheme is incorporated in toto in each of the

six counts. The alleged offenses consisted in mailing six separate letters in furtherance of this one specific scheme.

At the beginning of the trial Count No. 4 was dismissed on motion of the petitioner as being a repetition of Count No. 1 (Trans. pp. 27, 81). During the trial Count No. 3 was dismissed on motion of the United States Attorney (Trans. p. 190).

The petitioner pled not guilty to each of the counts of the indictment and seasonably moved the trial Court for an order directing the Government to furnish him with a bill of particulars, which motion and demand for said bill of particulars is set forth beginning with page 15 of the transcript of record. This motion was by the Court granted in part but otherwise denied by the trial Court. No ground of error is urged herein as to the refusal of the Court to grant any part of the demand and mention of the same is only made herein because the Government, in conforming to the order granting in part the bill of particulars, limited the charge to certain items and dates (Trans. pp. 21 and 23).

Upon such indictment and the bill of particulars as furnished by the Government the cause proceeded to trial before the Honorable William H. Sawtelle and the jury.

One of the main points relied upon by petitioner is that the state of the case and record as it was when the cause was submitted to the jury resulted in the defendant being tried and convicted in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

This point arose due to the fact that the indictment specifies the scheme to defraud to have consisted of twelve major and essential elements. The Court excluded testimony relative to several of these major elements and no evidence proving or tending to prove them was introduced in the case at all. When the cause was submitted to the jury they were authorized to determine the guilt or innocence of defendant upon a scheme or plan to defraud different than that as found and charged by the Grand Jury. This point was raised on the motion for a directed verdict made at the conclusion of the Government's case in chief (Trans. p. 251) and on a similar motion made at the close of all the testimony (Trans. p. 376). It was likewise urged in appellant's motion for a new trial (Trans. p. 403).

During the trial the Government produced as one of its chief witnesses a man named Cameron Bradley, whose testimony, if true, was most damaging to petitioner (Trans. pp. 176-209). On cross-examination petitioner sought to elicit from this witness his then address and place of residence (Trans. p. 191). The Court sustained objections to this line of inquiry. Petitioner further maintained that he was informed the witness was then in the custody of the Federal authorities and that he had a right to question him upon this in order to show his bias or prejudice (Trans. 198). The trial Court refused to permit such cross-examination on the objections of the Government. The Circuit Court of Appeals, in its majority opinion, holds that these rulings of the trial Court were correct, which holding is in direct conflict with

prior decisions of the Supreme Court and of the Circuit Court of Appeals from other than the Ninth Circuit.

The trial Court refused to give an instruction, requested by petitioner, pertinent and necessary to his defense (Requested Instruction 10; Trans. p. 401). The refusal to give this instruction was upheld by the Circuit Court of Appeals, in its majority opinion, which holding is in direct conflict with prior decisions of this Court and of Circuit Courts of Appeal from other than the Ninth Circuit.

The trial Court instructed the jury in such manner as to authorize the jurymen to return a verdict of guilty upon proof of representations made by petitioner and which were not a part of the alleged fraudulent scheme as set forth in the indictment (Trans. p. 401). Contrary to prior decisions of Circuit Courts of Appeal from other than the Ninth Circuit the giving of such an instruction was upheld by the Appellate Court.

The jury found the petitioner guilty as charged in Counts I, II, V and VI of the indictment (Trans. p. 68). Petitioner moved the Court for a new trial which motion was denied (Trans. p. 403). Thereafter petitioner moved in arrest of judgment which motion was denied (Trans. p. 404).

Thereupon the Court made its judgment and sentenced petitioner (Trans. p. 406).

Petitioner thereafter duly brought and perfected his appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The convictions of

judgments appealed from were affirmed, by a divided Court on May 26, 1930. The majority opinion was written by Mr. Justice Wilbur and concurred in by Mr. Justice Rudkin (Trans. pp. 492-503). Mr. Justice Dietrich filed a dissenting opinion (Trans. pp. 503-506).

Thereafter a petition for a rehearing was filed and denied by said United States Circuit Court of Appeals (Trans. p. 507).

SPECIFICATION OF ERRORS RELIED UPON.

It is petitioner's contention:

First, that he was denied the benefits and convicted in violation of the provisions of the Fifth Amendment to the Constitution of the United States in that the action of the lower Court in permitting the cause o go to the jury without proof of certain essential elements of the indictment was in effect an amendment of the indictment. That the majority opinion of the Circuit Court of Appeals upholding such action of the trial Court is contrary to prior decisions of the Supreme Court of the United States and of many other Circuit Courts of Appeal, such as the cases of *Ex parte Bain*, 121 U. S. 1, 30 L. Ed. 849; *Naftzger v. U. S.*, 200 Fed. 494 (C. C. A. 8).

Second, that the majority opinion of the Circuit Court of Appeals relative to the right of petitioner to cross-examine the witness Cameron Bradley is in direct conflict with prior decisions of the Supreme Court of the United States and of prior decisions

rendered by the United States Circuit Courts of Appeal of other circuits, such as the decisions rendered in:

Tla-Koo-Yel-Yee v. U. S., 167 U. S. 274;
The Ottowa v. Stewart, 20 U. S. 165;
Furlong v. U. S., 10 Fed. (2d) 492 (C. C. A. 8);
Farkas v. U. S., 2 Fed. (2d) 644 (C. C. A. 6).

Third, that the majority opinion of the Circuit Court of Appeals in so far as it deals with the refusal of the trial Court to give defendant's requested Instruction No. 10 is in direct conflict with prior decisions on the same point of the Supreme Court of the United States and of Circuit Courts of Appeal of other circuits, such as the cases of:

Byrd v. U. S., 180 U. S. 356;
Calderon v. U. S., 279 Fed. 556 (C. C. A. 5);
Hendry v. U. S., 233 Fed. 5 (C. C. A. 6);
Carney v. U. S., 283 Fed. 398 (C. C. A. 8).

Fourth, that each of the matters passed upon in the majority opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority.

Fifth, that the majority opinion of the Circuit Court of Appeals relative to the instructions as given by the trial Court to the jury is in conflict with the weight of authority.

Sixth, that the dissenting opinion of Mr. Justice Dietrich correctly states the law as found in the prior decisions of this Court and Circuit Courts of Appeal.

ARGUMENT.

1. AS TO THE FAILURE OF THE GOVERNMENT TO PROVE THE ALLEGATIONS OF THE INDICTMENT RELATIVE TO THE SO-CALLED "TEN-WAY-TO-WIN-SYNDICATE."

Petitioner has raised two points relative to the failure of the government to prove the allegations relative to the "Ten Way To Win Syndicate." These points are as follows:

(a) That his conviction, in the absence of such proof, was in violation of the Fifth Amendment to the Constitution, and

(b) The majority opinion, affirming such conviction, in the absence of such proof, is in direct conflict with prior decisions from other circuits and of the Supreme Court.

The Solicitor General has attempted to answer only the first point by relying on the cases of *Salinger v. United States*, 272 U. S. 542; *Silkworth v. United States*, 10 F. (2d) 711 and *Beahan v. United States*, 13 F. (2d) 558.

The case of *Salinger v. U. S.*, supra, was on a writ of error to the District Court of South Dakota and presented a situation totally different from the case at bar. The indictment in the *Salinger* case set forth several distinct fraudulent schemes and the trial Court, on motion of defendant, withdrew all but one of these schemes from the consideration of the jury, as was pointed out in this Court's opinion (272 U. S. 548):

> "The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively distinct plans for fleecing in-

tended victims. What the court withdrew from the jury was all of these plans but one."

This Court refused to pass on the correctness of the trial Court's action and transferred the cause to the proper Circuit Court of Appeals for a review of the judgment. On such review the Circuit Court of Appeals reversed the conviction, on the ground there was no evidence to establish that Salinger used the letter for the purpose of executing the specific scheme which had not been withdrawn from the jury:

> " * * * there was not in this case any such substantial and relevant evidence as could sustain beyond a reasonable doubt a finding that the defendant Salinger, Jr., devised or used the letter set forth in count 7 for the purpose of executing the fraudulent artifice, device, or scheme described by the court and submitted to the jury."
>
> *Salinger v. United States*, 23 Fed. (2d) 48, 52, (C. C. A. 8).

This conclusion of the Circuit Court is identical with the one that should have been arrived at in the instant case.

A further reading of the decision of the Circuit Court in the *Salinger* case discloses that the indictment contained fourteen counts, alleged the scheme to defraud and "The indictment, after alleging this scheme, fills 12 printed pages of the record with averments of alleged acts of the defendants, *which it declares they did in executing the scheme*, * * *." (23 Fed. (2d) 49). On page 50 of the reported case the Court points out that the matters withdrawn from

the consideration of the jury were four "alleged fraudulent means of executing the plan."

In the *Salinger* case the scheme to defraud, as found by the Grand Jury, at all times remained the same and was not added to or subtracted from by any action of the trial Court.

Silkworth v. United States, 10 Fed. (2d) 711, presents no better situation so far as the Government is concerned. In that case the Grand Jury returned an indictment alleging two schemes, the first aimed at one set of alleged victims and the second aimed at a different set. This distinction is pointed out by the Circuit Court of Appeals on pages 714 and 715 in upholding the action of the trial Court in disregarding the first of the alleged schemes:

> "The fallacy of the claim that the indictment is bad is due to the failure of the plaintiffs in error to observe that charges 1 and 2, as above given, are independent of each other. * * * The language used relates to different groups of victims." (10 Fed. (2d) 714-715).

Thus, the second scheme was not tampered with and remained and was proved exactly as the Grand Jury had charged it.

Lastly, the Government cites *Benham v. United States*, 13 Fed. (2d) 588. This case had previously been before the Court (*Benham v. U. S.*, 7 Fed. (2d) 271). The point as to the failure of the Government to prove an essential allegation of the indictment was neither raised nor decided therein.

The foregoing cases, and several others which were not cited by the Government, are based upon situa-

tions totally different from that of the instant case and hold no more than where the indictment properly charges a fraudulent scheme *and* various means of carrying out such scheme, it is not necessary to prove all *of the means* used to further the alleged scheme; but there is no reported case, which we know of, holding that an essential element of the *scheme* as charged by the Grand Jury may be disregarded and need not be proved by the Government.

In the case at bar (as in several other cases dealing with prosecutions under Section 215, Criminal Code) the majority opinion has lost sight of the ruling made by this Court in *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516, that pleading this offense in the language of the statute is not sufficient:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. * * * As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial." (124 U. S. 486-487; 31 Ed. 517-518)

and in the concluding sentence of the opinion this Court states:

> "Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

In obedience to the foregoing decision the Grand Jury set forth the particulars constituting the alleged fraudulent scheme and expressly declared the matters relating to the "Ten Way to Win Syndicate" to be essential and integral parts of the scheme. No Court, therefore, can construe an allegation which the Grand Jury has found and designated *as such integral part of the scheme* as being *merely a means* for carrying the scheme into effect or to a successful conclusion. The majority opinion of the Circuit Court of Appeals has overridden the finding of the Grand Jury in this regard and holds the "Ten Way to Win Syndicate" allegations to be merely "means" or "plans" which the appellant devised "for his escape from the predicament in which his fraud placed him" (R. p. 497).

Neither the trial Court nor the Circuit Court had the power to substitute its opinion for the express finding of the Grand Jury.

The Grand Jury set forth a scheme to defraud of which the "Ten Way to Win Syndicate" matters were integral parts and charged that in furtherance of such scheme that the various letters were mailed. Any action of the trial Court which permitted the trial jury to convict petitioner for mailing these same letters in furtherance of some other scheme of which the "Ten Way to Win Syndicate" matters formed no part, was in substance and effect an amendment of the indictment.

The Government seems to rely upon the proposition that an indictment can only be amended by some physical act apparent to the eye on an inspection of

the indictment, such as drawing a pen through portions thereof. If such were true, then great regard would be given to mere matters of form and none paid to matters of substance; courts would then be permitted to do indirectly that which they could not do directly.

We submit that any action of the trial Court, whether it be on the face of the indictment or in some other manner, which alters the charge as found by the Grand Jury, is to all legal purposes and effect an amendment of the indictment.

Thus, in *Naftzger v. U. S.*, 200 Fed. 494, (C. C. A. 8) the Court held that to disregard and fail to prove an essential allegation of the charge was in effect an amendment of the indictment, even if indictment would have stated a public offense had such allegation been omitted therefrom by the Grand Jury.

In *United States v. Dombowski*, 252 Fed. 894, the indictment charged the defendant, in one count, with having violated the Espionage Act by doing all of the acts denounced by Section 3 thereof. The District Attorney asked leave to elect to rely upon one of the acts charged and nolle pros the others. In denying this request the trial Court said (p. 898):

> "It seems clear that, if the District Attorney is permitted to nolle pros a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the grand jury. * * * In Words and Phrases, vol. 1, First Series, at p. 368 et seq., and in vol. 1, Second Series, at p. 199

et seq., numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof."

The Court then applied the reasoning adopted in *Ex Parte Bain*, 121 U. S. 1, in the following manner:

"It is quite possible that if the indictment in the present case had been limited to one of the various crimes now charged therein, before it had been presented to the grand jury, the latter might not have been willing to return it in that form. It is not unlikely that the required number of jurors were satisfied to return the indictment in its present broad form because of a belief that its scope would be narrowed, as it is now sought to narrow it, to a single offense before the trial. Some members of that tribunal, less than the number necessary to find a true bill, may have found probable cause to believe that one of the crimes thus charged had been committed, while others may have been satisfied of the commission of another of such crimes, but may not have been willing to return an indictment joining these various offenses, except upon the understanding that the defendant would not be actually tried for all such offenses. If this be so, it is impossible to know whether the required number of jurors would have voted for a bill charging only the offense which the District Attorney may elect to rely on. At all events, it certainly cannot be said that if part of this indictment be removed the remainder will constitute the indictment as returned by the grand jury" (p. 899).

In the case at bar, if the trial judge had drawn a pen through the portions of the indictment dealing

with the "Ten Way to Win Syndicate," no question would arise as to his act constituting an amendment of the indictment. If he had made a written or minute order striking out such portions still no question would be raised that such act also constituted an amendment, even though the indictment itself was not defaced. When the trial judge allowed the case to go to the jury, over the objection of petitioner (R. pp. 251, 376), without proof of such material allegations of the indictment, he just as effectively amended the indictment by striking such portion therefrom as if he had done any or all of the foregoing acts.

Petitioner further contends that the majority opinion in affirming his convictions, in the absence of proof relative to the "Ten Way to Win Syndicate" is in direct conflict with prior decisions of this Court and of other Circuit Courts of Appeal.

The majority opinion devotes several pages to upholding the convictions in the absence of such proof (R. pp. 492-498).

We have pointed out, on pages 9 to 28 of our brief attached to our petition herein, that the Grand Jury set forth the allegations regarding the "Ten Way to Win Syndicate" as essential elements of the alleged fraudulent scheme.

The particulars of the scheme, as set out in the indictment, are matters of substance and not of form.

United States v. Hess, 124 U. S. 483, 489;

Brooks v. United States, 146 Fed. 223, 227 (C. C. A. 8);

Brown v. United States, 146 Fed. 219, 220.

As Section 215, Criminal Code, does not contain a definition of what constitutes a scheme to defraud, the details and particulars of such scheme must be found and set forth in the indictment by the Grand Jury (*United States v. Hess*, supra; *Brown v. United States*, supra).

The particulars of the scheme thus become material parts of the indictment, descriptive of that which is legally essential to the charge and must be proved in evidence and can never be rejected as surplusage (*U. S. v. Sauer*, 26 Fed. Cas. 388, case No. 15,403).

A party can only be tried upon the indictment as found by the Grand Jury and especially upon all its language found in the charging part (*Ex Parte Bain*, 121 U. S. 1; 30 L. Ed. 849); and the evidence must conform to and support all the material allegations thereof (*Nuttycombe v. U. S.*, 200 Fed. 194 (C. C. A. 8th)).

If the scheme as alleged is not established by the proof a defendant cannot be convicted (*Brown v. U. S.*, 146 Fed. 219, 220).

The majority opinion, affirming the conviction without proof of these material allegations of the scheme, as found and charged by the Grand Jury, is diametrically opposed to the foregoing decisions.

The Government, on page 4 of its brief in opposition to our petition, seems to lay some stress on the fact that the evidence relative to the "Ten Way to Win Syndicate" was stricken out on motion of petitioner and not the Government. We cannot see how it becomes material whether this evidence was stricken

the case at all. The only reason that suggests itself is the Government mentions this fact so as to convey the impression that its failure to prove these material matters was an error invited, in some way, by petitioner.

Petitioner does not contend that the Court erred in admitting incompetent or immaterial testimony at his invitation or without objection on his part. Petitioner does not contend that the Court erred in striking out this testimony. It is our contention the Court was correct in striking out all testimony relative to the "Ten Way to Win Syndicate" and that the exclusion of such testimony resulted in the Government being unable to prove the alleged scheme to defraud as found by the Grand Jury.

Petitioner's motion to strike out this testimony was as follows (R. p. 133):

> "Mr. Friedman. Before cross-examining I desire to ask the Court for an order striking all the testimony of this witness as to the Ten-Way-To-Win Syndicate on the grounds the same is incompetent, irrelevant and immaterial and no proper foundation has been laid for it in this, that the indictment and the bill of particulars furnished by the Government specify that the Ten-Way-To-Win Syndicate and everything pertaining thereto was part of the original plan and scheme formed by Mr. Alford, which they place in the bill of particulars as having been formulated on or about the 17th day of January, 1927.
>
> There was no foundation laid and there has been no proof up to the present time that the Ten-Way-To-Win Syndicate ever had any exis-

tence in thought or in fact in Mr. Alford's mind or any one else's mind prior to the 23rd day of May, when this witness testified he had a conversation relative thereto. As I understand it, the Government is bound by its specifications as to what this plan and scheme consisted of. If there was a part that occurred in January without any thought of anything that was going to occur the next May, and when May came around and a new plan of operation was evolved, that could not be the plan relied upon by the Government in this case."

In striking out this testimony the trial Court acquiesced in and adopted the reasoning and grounds contained in petitioner's motion by stating

"* * * * the indictment alleges that it was a part of the alleged original scheme, while the testimony in my judgment, does not so show" (R. p. 148).

This action of the trial Court was in direct conformity with our contention. The "Ten Way to Win Syndicate" matters being a part of the original scheme, and so alleged in the indictment, proof thereof and that it was part of the original scheme was necessary on the part of the Government.

The Government made no effort to introduce any other testimony of the "Ten Way to Win Syndicate" or to lay any foundation or predicate for the admission of such testimony either in its case in chief or in rebuttal.

The ruling of the trial Court in this behalf was proper. It was not error invited by appellant but

the assertion of a right the correctness of which the trial Court upheld. Nothing appellant did at the trial can be used to cure the failure of the Government to prove a matter of substance alleged in the indictment as an integral part of the scheme to defraud. The burden was on the prosecution to prove the scheme as alleged and its failure to do so cannot be excused or cured by any act of appellant.

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2. AS TO THE CURTAILMENT OF THE CROSS-EXAMINATION OF THE WITNESS BRADLEY.

This point has been fully argued in our original brief, pages 31 to 48.

The Solicitor General on page 6 of the Government's brief in opposition to our petition, admits the correctness of our contention in the following words:

> "Although we question the correctness of the ruling, it would hardly seem to constitute reversible error, as it is not shown that prejudice resulted."

This admission of the Solicitor General causes this case to present a situation identical with the one presented in *Tia-Koo-Yet-Lee v. United States*, 167 U. S. 274; 42 L. Ed. 166, where this Court reversed a conviction solely on the grounds urged under this point by petitioner.

The Government suggests that no showing is made that prejudice resulted from this ruling. Cameron Bradley was the most important witness called by the Government. Without his testimony no convic-

tion could ever have been had. He testified to many conversations alleged to have occurred with petitioner when no one else was present, which conversations were denied by petitioner. Thus, it was incumbent on the jury to decide whether Bradley or petitioner was worthy of belief. Any deprivation of the right of legitimate cross-examination of this witness, affecting his credibility, resulted in great prejudice to petitioner. Bradley's testimony will be found in the record from pages 176 to 209 and from 373 to 375. Merely to read this witness' testimony establishes how vital it was to the Government's case and how necessary it was for the Government to preserve this witness' credibility before the jury.

What other showing of prejudice could possibly be made by petitioner? He could not prove or offer to prove the witness' bad reputation for truth, honesty and integrity, because the Government's objection prevented him from learning the residence of the witness. He could not show the association, place or manner of living of the witness nor his bias or prejudices, nor that his testimony was colored by some hope of reward or immunity for like reason. In other words the Government contends we should demonstrate that which the Government has made it impossible for us to demonstrate.

Mr. Justice Dietrich, in his dissenting opinion, disposes of this contention as follows (R. p. 505):

> "It comes with poor grace from the district attorney now to say that even if erroneous, the ruling was not prejudicial. If he did not fear the effect of the desired disclosures, why did he

> so promptly and persistently resist the offer to make them? To me it is little less than amazing that objection was interposed to a simple inquiry as to where the witness lived."

The best evidence that the ruling was prejudicial to petitioner is found in the prompt and persistent objections of the Government to (as Mr. Justice Dietrich terms it) this "natural and ordinary inquiry which defendant was seeking to make."

The contention of the Government that the burden was on petitioner to show prejudice has been fully answered in a recent decision of the Supreme Court of California. In the case referred to the district attorney had used a transcript of testimony taken before the Grand Jury in examining a witness. An inspection of the transcript was denied the defendant. On appeal defendant complained of this action and the prosecution attempted to justify it on the ground that defendant had shown no prejudice as a result thereof. The Supreme Court thus disposed of the matter (emphasis ours):

> "Where a transcript is made under the circumstances here shown and used by the district attorney in the manner related by the decision, and its contents are denied inspection by the defendant, it comes in poor grace for the People to invoke the provisions of article VI, section 4½, of the Constitution, to the effect that the burden is upon the appellant to show prejudicial error. The only way in which prejudicial error could possibly be shown is by an inspection of said transcript and this right has been denied him. It was not intended that said constitutional pro-

visions should be applied in such a case. *To so apply them it would require a showing on the part of the defendant which is rendered impossible by the act of his adversary.* The constitutional provisions impose the burden of showing prejudice or injury by a ruling which is within the power of the complaining party to present. *It does not contemplate a situation where such party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured.*"

People v. Stevenson, 79 Cal. Dec. 141.

So in the instant case how can petitioner more positively show prejudice when the very information he was seeking on cross-examination was denied him by the action of the Government?

"The power of cross-examination is one of the most efficacious tests which is known to the law for the discovery of truth. To deprive the defendant of this right in a proper case * * * is error for which a judgment of conviction should be reversed."

People v. Westlake, 124 Cal. 452, 459.

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3. THE REFUSAL TO GIVE PETITIONER'S REQUESTED INSTRUCTION NO. 10.

It will be recalled that petitioner's requested Instruction No. 10 was one which in substance stated that a finding that any promises made by defendant were not fulfilled or that any representations as to future events did not occur as represented in and of itself was not sufficient to establish the fact that the

defendant did not intend to fulfill such promise or that he knew such representation to be false. This instruction would further have told the jury that there had to be evidence in the case to establish the fact that defendant knew at the time of making any such promise or representation that it would not be fulfilled which evidence had to be something in addition to mere proof that such promise was not kept or such representation not fulfilled (R. p. 401).

The majority opinion of the Circuit Court attempts to justify the refusal to give this requested instruction on the ground that it was substantially contained in other instructions given by the Court (R. p. 502). The Government attempts to uphold the majority opinion on like grounds. The majority opinion has misconstrued the language and purpose of the requested instruction as is evident from a mere reading of the opinion which states:

> "The requested instruction states that the evidence must establish the fact that the defendant knew at the time of making such promise or representation that it would not be fulfilled whereas the court properly instructed the jury that, if when the promise was made the defendant had no intention of performing, such promise was fraudulent" (R. p. 502).

The requested instruction did not deal with the proposition of law that the defendant must have known at the time of making such promise or representation that it would not be fulfilled but contained the proposition of law, material to petitioner's defense, that mere proof of the failure to keep a promise or

to fulfill a representation did not supply the proof necessary to establish that petitioner did not intend to fulfill such promise at the time it was made. The proposition contained in the requested instruction was entirely different from that given by the Court anywhere in its charge.

The charge of the Court is set forth in full from pages 379 to 398 of the record. It is true the Court instructed the jury that no promise or representation as to the future could be criminally false unless made with the intent of never being fulfilled; but nowhere in the charge did the Court instruct the jury along the lines set forth in the requested instruction.

We have set forth in our brief, in support of our petition herein, from pages 48 to 54, various cases which hold that a defendant in a criminal case is entitled to have the jury specifically instructed on all questions of law applicable to his defense. We have further pointed out therein it was part of petitioner's defense that if any promise or representation as to the future was made by him it was made with intent on his part to fulfill the same. It therefore became most important that the jury be instructed as requested.

In the absence of such instruction the jury could and undoubtedly did find that because said promise and representation as to the future were made by Alford and not fulfilled, such non-fulfillment established the fact that Alford never had any intention of performing or fulfilling such promises or representations.

To demonstrate how prejudicial to petitioner was the failure to give this instruction, we call the Court's attention to that part of the charge which reads as follows (R. p. 393):

> "Every man is presumed to intend the natural and probable consequences of his acts."

In the absence of the requested instruction and in view of the foregoing portion of the Court's charge the jury could have arrived at no other conclusion and pursued no other course of reasoning but the one which lead to finding that any promises or representations made by petitioner were made without intent of fulfilling or performing them because petitioner was presumed to intend the natural and probable consequence of his acts and because the evidence showed that such promise and representations were not fulfilled.

A similar situation arose in the case of *Hibbard v. United States*, 172 Fed. 66 (C. C. A. 7) where the Court instructed the jury, in the same kind of prosecution, as follows: "The law presumes that every man intends the natural, legitimate and necessary consequence of his acts." In reversing the case for the giving of this instruction the Circuit Court said (172 Fed. 72):

> "Of course, no such rule is applicable to the case at bar; and it appears from other instructions, submitting the issue of intent to determination by the jury from all the evidence, that the court intended no such conclusive effect to be understood from the above-mentioned instruction. Nevertheless, the unqualified terms so stated, as

a presumption of law, are erroneous, and their liability to mislead the jury is undoubted, irrespective of the contention on behalf of the plaintiff in error that no presumption of specific intent to defraud—which is the statutory offense charged in the indictment—arises from the fact that fraud may appear to be the natural consequence of the act committed. The distinction between presumptions of law and mere inferences of fact is not observed in this instruction; and, assuming it to intend a disputable presumption of law (1 Greenleaf on Ev. sec. 33), its effect must be to cast the burden upon the accused to disprove fraudulent intent, which is unauthorized. McKnight v. United States, 115 Fed. 972, 54 C. C. A. 358, and authorities cited."

Further on on the same page of the reported case the Circuit Court deals with the proposition that no matter how fraudulent a scheme may turn out to be, or that certain results occurred, such fraud or results could not establish, as a matter of law, the intent with which any things were done by the defendant:

"The statute (section 5480) prescribes as the offense devising and executing a scheme with intent to defraud. While the fraudulent character of the scheme, as executed, is necessarily charged and must be established by proof, conviction cannot rest on the fact that the scheme is fraudulent in its operation, for commission of the statutory offense requires specific intent on the part of the accused to defraud the patrons of the Institute. Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709. In other words, however fraudulent in tendency or

fact the scheme may appear to be, neither the scheme nor its execution is punishable under the statute, unless the evidence, direct or circumstantial, establishes as well (and beyond reasonable doubt) the essential ultimate fact charged as the violation—that it was devised and carried out by the accused with intent to defraud the patrons of the Institute, as described in the indictment. Proof of the nature of the scheme and its effect upon the patrons constitutes circumstantial evidence, together with the facts appearing in its execution, from which the intent of the accused in such execution may legitimately be inferred, in the light of all circumstances bearing upon the crucial issue. The accused, however, is entitled to the benefits of the presumption of innocence and good faith, created by the law in his favor, and to have the jury instructed accordingly, in terms which involve no doubt of their meaning, so that the question of intent is thus presented, as an issue of fact alone, upon which the accused must be acquitted, unless both presumption of good faith and evidence introduced in his favor are overborne by direct and circumstantial proof, establishing beyond reasonable doubt his intent to defraud the patrons by the efforts and means employed in use of the mails.

Although the cardinal rules (a) that innocence must be presumed and (b) that intent to defraud must be proven beyond reasonable doubt are repeatedly stated in the instructions, we are of opinion that the above-mentioned instruction as to intent presumed by law was erroneous and confusing upon that issue, and not cured (as counsel for the government contends) by the other

instructions referred to. The intent may rightly be inferred from the circumstances in evidence; but it is an inference of fact—not a presumption of law."

No exception was taken to the portion of the Court's charge stating that a man is presumed to intend the natural and probable consequences of his acts, but such instruction having been given we call it now to this Court's attention to demonstrate the prejudice that resulted to petitioner in not giving the instruction requested. As pointed out above all the instructions, as given by the trial Court, told the jury that it was necessary to prove that any promises or representations made by petitioner were false and known by petitioner to have been false (R. p. 385) and that the intent of the defendant was the very gist and substance of the fraud, without which it would be impossible to devise a scheme to defraud (R. p. 382); that good faith and lack of intent to defraud constitute a defense and any promise or representation relating to the performance of some act in the future does not constitute a false or fraudulent pretense, representation or promise, even though such act was not performed by the defendant, if, at the time of making, the defendant was of the opinion and honestly believed that he could and would perform the same (R. pp. 391-392); that every man is presumed to intend the natural and probable consequence of his acts (R. p. 393). Under these instructions the jury was told, in substance, that no promises or representa-

made with a knowledge of their falsity and an intent not to perform them; nevertheless, he was presumed to intend the natural and probable consequences of his act. This was the equivalent of stating that if any promises were not fulfilled or performed he was presumed to have made them without any intent of fulfilling or performing them. If the requested instruction had been given the error in the Court's charge would have been cured. The jury would have been specifically informed that mere proof of the failure to fulfill or keep a promise or representation did not constitute proof that such promise or representation was made with intent not to fulfill or keep it. Such is the law as announced in the case of *Hibbard v. United States*, supra, and in the case of *Post v. United States*, 135 Fed. 1.

The majority opinion, upholding the refusal to give this requested instruction is in direct conflict with the weight of authority, the two foregoing cases, and the rules of law as announced in the cases from this Court and from the Circuit Courts of Appeal from the Fifth, Sixth and Eighth Circuits as set forth on pages 51-52 of our brief in support of our petition herein.

CONCLUSION.

We respectfully submit that each of the points raised in our petition for a writ of certiorari herein and argued and discussed in our brief in support thereof and in our supplemental brief are well taken

and that the majority opinion of the Circuit Court of Appeals is in direct conflict with weight of authority and of prior decisions of this Court and of other Circuit Courts of Appeal.

Dated, San Francisco,
December 10, 1930.

Respectfully submitted,
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